

**California Commission
on
Health and Safety and Workers' Compensation**

MINUTES OF MEETING

Meeting Day and Date: Thursday, July 25, 1997

Meeting Location: State Office Building
1350 Front Street
Auditorium
San Diego, California

Commission Members Present:

Chairman James J. Hlawek
Commissioner Gerald O'Hara
Commissioner Tom Rankin
Commissioner Kristen Schwenkmeyer
Commissioner Robert B. Steinberg
Commissioner Darrel "Shorty" Thacker
Commissioner Gregory Vach

Commission Members Absent:

Commissioner Leonard McLeod

Commission staff:

Christine Baker, Executive Officer of the Commission

Call to Order

The meeting was called to order at 10:00 a.m. by Chairman James Hlawek.

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Adoption of Minutes

Chairman Hlawek asked for a motion regarding the minutes of the Commission meeting on June 19, 1997, which had been submitted for approval by Christine Baker. A motion to adopt the minutes was made by Commissioner Rankin and seconded by Commissioner O'Hara. There were no objections and the motion passed unanimously.

Response to CHSWC Profile of DWC Office Operations

Christine Baker reported that the Commission had conducted walk-throughs of various Division of Workers' Compensation offices and had prepared a report of findings.

The Commission requested that DWC Administrative Director Casey L. Young respond to those findings in writing and at this meeting¹. Mr. Young provided the following testimony:

Pure Premium Rates

Mr. Young reported that he just heard that the Workers' Compensation Insurance Rating Bureau is currently recommending a 3.2% reduction in the pure premium rates. He said that it is good news and reflects a rate that is back down to the 1970's level.

WCRI Benchmarking Project

Mr. Young stated that he believes the benchmarking study proposed by the Workers' Compensation Research Institute (WCRI) is a good one and deserving of support. However, DWC is not able to provide financial support for the study.

He said that DWC has been a member of WCRI for many years. Over the years he has been impressed with WCRI and has encouraged the organization to focus some

¹ On June 25, 1997, the Commission sent a memo to DWC Administrative Director Casey L. Young containing excerpts from the Profile report and requesting his response. Specifically, Mr. Young was asked to provide CHSWC with a plan in writing by Wednesday, July 15 on how he is addressing, or plans to address, the Profile report findings. Mr. Young was also requested to present that plan at the upcoming CHSWC meeting on July 25, 1997. The Commission did not receive a written response from Mr. Young.

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of their efforts on California. He believes that the inclusion of California in the benchmarking study will allow for interstate comparisons that otherwise cannot occur. Mr. Young said he intends to be cooperative in the WCRI study and encouraged the Commission to do the same.

DWC Regulations

Mr. Young reported that there are four types of regulations that will go out to public hearing in the next month or so: Audit, Welfare Reform Law, Medical Fee and Hospital Schedule, and Rehabilitation.

The first are audit regulations which were developed by recommendations from the DWC audit simplification committee.

Second are regulations relating to the welfare reform law which has provisions preventing the state from providing services to illegal immigrants. This law will affect delivery of benefits by the Uninsured Employers Fund (UEF) and the Subsequent Injuries Fund (SIF) and requires the development of regulations which dictate how to determine eligibility.

Third are regulations dealing with the medical fee schedule. An Advisory Committee created by the IMC and comprised of payers and providers developed some recommendations and presented them to DWC. Mr. Young stated that he feels that physicians in workers' compensation should receive the same pay as physicians in the non workers' compensation arena except in the area of office visits known as evaluation management codes which require more work. He said that it appears that the conversion factors will not be increased for any areas except the evaluation management codes so that they are comparable to what is paid under the federal workers' compensation program. He stated that after looking at the values and the different payments under different systems, he believes that the advisory committee made a mistake in not going forward with a Resource-Based Relative Value System (RBRVS) federal workers' compensation program type of schedule and that he wishes DWC had gone that way this year. He said there are values out of whack in the current schedule that would be fixed under the federal schedule.

Mr. Young reported that he is also putting out regulations in the hospital fee schedule. He said that a hospital fee schedule was adopted effective April 1, 1997. However, the Community Care Network (CCN) went to court and got a temporary restraining order against DWC putting out an instruction book for use of the hospital fee schedule because it referenced the federal factors in terms of what level of compensation the hospital would get. Because those factors weren't put into

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regulation, CCN's position was that the instruction book was an "underground regulation". Mr. Young said that they battled in court until it was finally decided to put those conversion factors in a regulation. He said that there is also some pending legislation sponsored by CCN that would change the formula once again.

Mr. Young said the medical legal fee schedule will also be updated in this set of regulations. He stated that his intention at this point is not to make any changes in conversion factors but to take what the IMC Advisory Committee provided to clarify some of the contentious issues between the payers and the providers.

The final set of regulations are the vocational rehabilitation regulations. The regulations require that the California Postsecondary Education Commission (CPEC) approve rehabilitation schools. However, since the CPEC is going out of existence and the function can be performed by the Department of Consumer Affairs, the regulations will be changed to reflect that shift. Additionally, Mr. Young pointed to the probability of the passage of AB 237 which deals with the \$16,000 benefit cap and loosens up the use of rehabilitation money within the existing cap. Mr. Young said that he hopes to turn the regulations around quick enough to provide guidance to the community should the legislation pass and become effective on January 1, 1998.

Mr. Young continued by saying that DWC may adopt additional vocational rehabilitation regulations in response to some challenges brought forth by the California Workers' Compensation Institute (CWCI) that the policy and procedure manual which the DWC Rehabilitation Unit has adopted to provide guidance and consistency on VR issues is an underground regulation. Mr. Young stated that his staff recommended pulling the challenged procedures and putting them into regulations. However, he stated that he is reluctant to do so because the manual only serves as a guide to the DWC Rehabilitation unit staff and cannot take into consideration all the circumstances that can occur. Furthermore, a new policy and procedure manual is coming out within the next couple of months for the workers' compensation appeals board. If the rehabilitation manual is put into regulations then so should the WCAB manual which guides such issues as attorneys fees and the continuance policy. He opined that if DWC attempts to anticipate every decision that might be made by a rehabilitation consultant or a judge and puts it into a regulations, then they are going to strangle themselves in regulations. He said that he has an open mind about reviewing those particular ones that have been proposed but believes that regulations shouldn't be used in place of guidelines.

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Lien Issue

Mr. Young stated that he reviewed the Commission's lien proposal and made reference to an appendix that says that DWC agrees with the proposal. He stated that he believes the intention of the appendix is to relay that DWC participated in the process. However, he made it clear that DWC legislative positions are made only after he sees them, the DIR Director sees them, and the governor's office sees them. Only then do they have an official position. Although they are happy to work informally with the Commission, he is concerned about the representation of DWC endorsement.

Permanent Disability Memorandum of Understanding (MOU)

Mr. Young said that the Commission and DWC have been working through a proposed Memorandum of Understanding (MOU) which will define their respective roles in the procedures to be used in future revisions to the Permanent Disability Rating Schedule (PDRS). He said that he believes it is important that this be accomplished in light of the imminent unveiling of the findings from the RAND study of permanent disability and that he hopes DWC and the Commission can work through the issues and put together something in the next month or so.

DWC Office Profile Project

Mr. Young stated that when he read the findings from the Commission's DWC District Office Profile he found it valuable and interesting but limited, and said there were not any surprises. He said that it catalogs the resource and organization problems the Division has been faced with for years.

Mr. Young said that if the Legislature had appropriated the amount suggested by the Governor that the Division would have had almost four million dollars more with which to buy copiers, fax machines, and computers. He said that he doesn't want to be critical and understands that the Legislature has had some real budget constraints on the state level but wanted to make the point that the Governor's priority for DWC is higher than the Legislature's. But, he said, resource constraints are a reality which he believes does not come through in the Commission report.

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Strategic Planning

Mr. Young reported that two years ago the Division began a strategic planning process to focus Division efforts and resources. They started looking at performance measures but found that they do not have the tools to do that effectively. Mr. Young declared that there are three things that should be measured in an organization such as DWC: timeliness, quality, and quantity. However, the DWC computer system was not set up to provide the kind of information needed for performance measures. The system allows you to count how many opening documents went in and how many orders, approval settlements, and so forth, came out. What you can't measure is when those cases came in -- was it the day before, the year before, or ten years before? So it is not a useful management tool.

But over the last year, Mr. Young said, a lot of DWC time and resources has gone into the development of a process of "cohort" analysis which allows DWC to look at cases that came in the first quarter of 1996 and determine how long it took to get results and what was pending at any given point in time. The system provides perspective and a "to do" list rather than a "done" list. So one would know at any particular point in time that certain things should have happened. The case should have had an MSC in 30 days, a trial in 75 days, or a decision 30 days after submission. It will also give a list of cases to present to the judges with instruction to resolve and gives managers a tool to deal with undone work.

However, Mr. Young pointed out that this system depends on the input of accurate information which has been a problem. About two or three years ago, DWC started what they call the "60 day list" of cases where there has been a submission or a settlement issue and 60 days there hasn't been a decision or a settlement approval. It was used as a management tool for the presiding judges and assistant chief to figure out what is the undone portion of the work.

Mr. Young reported when the first version of the 60-day list was produced, it was obvious that DWC staff were not inputting the case data correctly. The offices are getting it right now but it raises an issue of data quality. Mr. Young said that since one can't always trust a computer so there must continue to be file audits and protocol for such audits. The DWC rehabilitation and claims adjudication units have piloted a tool they've developed for this purpose. Mr. Young noted that the Disability Evaluation Unit (DEU) has fallen behind due to the fee schedule, PD schedule, personnel issues, and some other things but will be coming up next. This will not only give DWC a better idea of what is going on in a file but will give them a feedback loop for judge training.

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Mr. Young believes that file audits can also assist with community education. There are policies and procedures that affect how the community should deal with cases and DWC can get a sense from the file whether or not that is happening and feed that back into the community. It can also help by providing a better ideas of the issues and areas of dispute in both rehabilitation and the WCAB. DWC would have a feedback loop to develop mechanisms such as additional training of DWC personnel or the community or informing the appeals board that this is an area that guidance is needed and suggesting an "en banc decision" or "significant panel decision" to address those issues.

Commissioner Vach asked about the legal precedent of the panel decisions versus en banc decisions. Do they carry the same weight?

Mr. Young responded that they don't. Panel decisions are decisions made by only three members but circulated among all seven who agree that it is an important issue and that this is the guidance that should be provided to the community. The community can expect that if the issue gets to the appeals board that they will decide in the way of their panel decision. But in terms of legal weight, it does not carry the same as en banc decisions. But it does provide the needed guidance to the community and he is pleased to see them responding to concerns about the need for further guidance.

Commissioner Vach then asked if the DWC policy and procedure manual will track these significant panel decisions so that judges and everybody else knows that these decisions are in effect binding. Mr. Young replied that the policy and procedure manual is not binding and therefore not the appropriate place to put decisions of that nature. It is DWC's role to have consistent procedures but it is the role of the WCAB to make decisions.

Refocusing on the strategic planning process, Mr. Young stated that one of DWC's goals is to make the best use of resources. Before they asked for an updated computer system, they wanted to look at their entire business process to give them some recommendations on how to do a better job of organization and how the business process can take advantage of the available technology.

Mr. Young said that KPMG was hired to do the job and DWC was disappointed in the project and its outcome. But he said that the study did get them started and with some "more tweaking it will probably be a useful document". Mr. Young said that DWC has spent the last year redoing a lot of what KPMG did to answer the control agencies' objections to their product. He said that KPMG did not analyze how much would be saved if processes were changed or if personnel were shifted. Instead KPMG performed a "touchy, feely focus group type of study" that holds no interest

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for the Department of Finance and Department of Information Technology. So DWC has been doing the work and expects to submit a feasibility study report back to the control agencies within the next two to three weeks.

As for the business processes within the organization, Mr. Young said that they are currently trying to sort through what changes should be made should the feasibility study report be approved. He said that he expects some answers in the next couple of months. The Division has some thoughts on how to reorganize the Division and those thoughts involve much of what KPMG said in their report. The Division is looking at a radical restructuring of the Division consisting of putting together a regional center that will deal with the telephones, summary ratings, and those kinds of things. It will separate the management function from the dispute resolution track. Mr. Young stated that he would be happy to report back to the Commission at a future meeting to lay out the detailed plan.

Mr. Young said that the feasibility report proposes a two phase reorganization plan. The first phase deals with infrastructure development and putting together the fragmented computer system so that there is one computer file for each claim that has all of the information in it such as the rehabilitation piece, the DEU piece, the court reporter's notes and everything else dealing with that case so one can bring it up on any computer. That is consistent with what KPMG suggested and should produce a lot of efficiencies once it is accomplished.

The second phase is to go to a paperless system and accept scanned documents. The pilot project, EDEX, is a growing service and the next logical step is to take the applications and DRs electronically. However, at this point DWC does not have the capability to accept scanned images. It will also utilize an interactive voice response kind of system where one can call a number, press in a case number, and find out if the case is set, and the last action. This will save a lot of time spent on phone calls.

Mr. Young reported that essentially, that is where DWC is headed in the 5 to 6 years. The first 2 to 3 years will be spent integrating the database and the next 2 to 3 years will be spent doing the rest.

Commissioner Hlawek asked if the costs associated with the computer integration and paperless system will come from funds that have already been set aside as well as anticipated savings.

Mr. Young said that was correct. The control agencies want to see the savings generated by such a conversion. The larger part of the savings will be generated from going paperless as they now spend \$700,000 a year in storage costs at the state record center. There are also a lot of files being stored in the District Offices. Savings

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will also be generated by the reduction of injuries to employees associated with the handling and moving of files. So just from these kind of savings, DWC should be able to afford the system.

Commissioner Rankin asked if DWC received sufficient money in their budget allocation this year. Mr. Young replied that they are getting what they asked for which is a positive change from the last two or three years.

Discussion on Draft Report of the CHSWC Hearing on Workers' Compensation Anti-Fraud Activities

Christine Baker reported that draft findings and recommendations from the Commission hearing on anti-fraud activities have been sent to Commission members.

The Commission has received written comments from the Department of Insurance and the California Applicants' Attorneys Association (CAAA) on the draft report. Larry Swezey, Commission legal consultant, provided an analysis of CAAA's comments to the commission. She recommended that his suggestions regarding CAAA's comments be incorporated into the report. In addition to those recommendations, Mr. Swezey suggested recommending that the WCAB issue an en banc decision resolving the conflicting interpretations of Insurance Code Section 1871.5 pertaining to the ineligibility of workers convicted of workers' compensation fraud of collecting benefits. Mr. Swezey also recommends increasing training for workers' compensation judges in this area.

Also, in response to Commissioner Vach's suggestion, Mr. Swezey has drafted proposed legislation to make workers convicted of workers' compensation insurance fraud ineligible to receive any compensation in the case in which the fraud was committed.

Ms. Baker stated that she was pleased to report that the Department of Insurance supports the majority of the Commission recommendations. They have advised that they have already addressed some of the issues that were identified in the draft report and have reservations about some recommendations. She suggested that the Commission issue a final report of the fact finding hearing on anti-fraud activities including the findings and recommendations that are supported by the Department of Insurance as well as the recommendations that are not supported by DOI because they have already taken action modified to reflect their actions. Or, since these findings and recommendations will be included in the Commission annual report,

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the Commission could choose not to issue a separate report at all but incorporate the findings into the annual report.

Ms. Baker reported that the Commission could also hold a round table discussion consisting of representatives from the Fraud Assessment Commission, the Department of Insurance Fraud Division, the District Attorneys, the DWC, the IMC, and all appropriate agencies to address some of the concerns that the community has raised.

Community Response to the Draft Report

Joe Markey stated that on behalf of the Fraud Assessment Commission (FAC) he appreciates that work that has been done by CHSWC toward the anti-fraud effort. There are a lot of good recommendations and the FAC supports most of them. He indicated that he met with Mr. Newman and concurs with almost all of his recommendations and conclusions.

However, Mr. Markey said that there are some issues that he would like to comment on. In the CHSWC recommendations, there is a reference to multi-year funding and, as one vote on the Fraud Assessment Commission, he doesn't think that the Fraud Assessment Commission should go that route until the legislature decides to have multi-year funding.

Mr. Markey continued by saying that in the past the Fraud Assessment Commission has had reservations about the activities of the Department of Insurance. However, he is pleased to report that many of those issues are being taken care of and would diminish the need for greater authority and responsibility of the Fraud Assessment Commission at this time. Mr. Newman has demonstrated a willingness to work with them and they are assured that the accounting records are being improved and there is progress in diminishing the problems in the duplication of resources.

Mr. Markey said that they are still concerned with developing some measurement of performance and believe that too great an emphasis is placed on the number of arrests or convictions. He said there is a big difference between closing a medical mill and the hundreds of hours that go into an arrest there versus "one fibber". He said that the Fraud Assessment Commission wants to be sure that there's not too great a reliance on pure numbers but rather try to figure out a way that performance can be measured taking in to account the complexity, impact on the community, and so forth.

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As for the recommendation for greater public relations efforts, Mr. Markey agreed with Mr. Newman that this area is better left in the hands of those who seek more publicity than they are prone to do and get those who can get the attention of the press and get greater mileage and the desired deterrent effect. He will submit a report in writing but overall is pleased with the Commission recommendations. He said that the Fraud Assessment Commission will take the recommendations under consideration and get back to the Commission if there are any questions.

Commissioner Vach stated that the impression he has gotten from the community is that the Fraud Assessment Commission has been weak in evaluating the efforts of DOI and the district attorneys because it had to rely on the information provided by the agencies and were unable to independently verify some of the outcomes of the cases. Commissioner Vach agrees that one shouldn't only look at the numbers by themselves because they can't tell the story. He asked Mr. Markey how the Fraud Assessment Commission can address the audit issue since it has no independent means of verifying information.

Mr. Markey answered that the accounting issue was addressed by using the Department of Finance which audited the entire Department of Insurance. An intensive audit was also performed on the DOI fraud unit. On August 19, 1997, the FAC will vote on engaging a further audit of the accounting aspects and the handling of money. This has been one of the problems about which they have expressed concern in the past.

Mr. Markey said that the FAC does have the KPMG report that has gone into great detail on the organization. They have also gotten legislation requiring the Department of Insurance to report data as is done by the district attorneys. This data is reviewed by a panel including the Administrative Director, a member of the public, two representatives of the Fraud Assessment Commission and the Deputy Commissioner. The application form allows them to take immediate action based upon performance. He stated that he believes that for the moment they have enough control without reorganizing the entire program.

Commissioner Vach stated that the concern is that 25 to 28 million dollars of employer money is continually being spent toward this program and they want to know how well it is being spent and assured that there is enough independence between the Fraud Assessment Commission and DOI and the DA's. They want assurance that it is a viable program. He said that he is skeptical that that is the case but is willing to go along with it for another year. He added that he would like to see a report that outlines how the evaluations were performed. Mr. Markey replied that the decisions and how they are arrived at are presented orally at Fraud Assessment

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Commission meetings. There is not a written report due to the sensitive nature of some of the information.

Commissioner Vach stated that the Department of Finance audit will not be a quality audit but a financial audit only. He asked if the other panel will be able to evaluate the quality and performance of both agencies. Mr. Markey replied that he doesn't believe it will be an ongoing process. It is in the hands of Mr. Newman and his staff to do the job and to the extent that they accomplish that continue to receive funding from the Commission at the level it thinks they need. If they see a deterioration or inefficiency, they can take financial action which they are willing to do if there is a failure in the program.

Commissioner Steinberg commented that he is still disturbed by some of the aspects of the fraud issue. He indicated that he still doesn't have a clear idea of how fraud is defined for purposes of criminal action. He asked if the Fraud Assessment Commission had established any guidelines for the benefit of the Department of Insurance or the prosecuting agencies as to the character of the fraud that they are interested in pursuing. He stressed the importance of a clear delineation between what is considered fraud and what is not especially in cases involving the termination of PD benefits. Mr. Markey replied that although he believes fraud is well defined in legislation, he will defer the question to either Mr. Newman or Ms. Sprague from the District Attorneys Association.

Commissioner Steinberg stated that there is still an issue among CHSWC members as well as the community as to the extent to which benefits should be withheld or denied because of fraud. In order to tackle that question and come to a sensible decision, the nature of fraud needs to be evaluated. Another issue he said he found disturbing was a case he heard about where a claimant was apparently charged, served with process, and even taken into custody at a board hearing on charges of fraud in the application for workers' compensation benefits. Although he isn't certain that the story is true, he thinks it raises additional questions as to the extent to which the fraud process preempts the board process and whether the criminal prosecution should await the findings of the board as presented under the workers' compensation statute.

Mr. Markey replied that it is the kind of issue that the CHSWC report addresses by suggesting a periodic task force meeting involving CHSWC, Fraud Assessment Commission, Department of Insurance, medical board, and the bar association. It is a subject that can be addressed to them as well as a member of the WCAB appeals board.

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Commissioner Hlawek called upon Mr. Markey and Ms. Sprague to answer some questions from Commission members. The first question is "What constitutes fraud?"

Mr. Newman stated that from the Department of Insurance Fraud Division standpoint, the cases that are assigned for active investigation are very egregious. Normally they try to get more involved in the cases that are multi jurisdictional and multi provider. That is the true benefit of the Fraud Division.

Ms. Sprague stated that there are really two different questions. The first is what is fraud. The second is there enough evidence to charge the case. Each question has a totally different answer. Fraud occurs when someone deceives someone else to get benefits. It is a matter of intent -- what the person's intent was when they deceived someone. In terms of what is actionable in the workers' compensation arena, the law is quite clear. If someone deliberately makes a misrepresentation in the courts to get workers' compensation benefits, it is something that can be pursued.

Commissioner Steinberg asked if the DA would preempt the judicial determination of the board on an issue before proceeding with criminal action. Ms. Sprague replied that she believes the criminal process should be independent of everything else. If enough evidence is presented to warrant a prosecution, she doesn't believe they should wait for anything.

Commissioner Steinberg commented that that was his concern. If an applicant files a fraudulent claim but the carrier lines up 6 witnesses to testify that the applicant hurt himself during the weekend, you would expect benefits to be denied during the workers' compensation appeals board process. He said that he is disturbed by the extent to which that process will be interrupted or chilled by the overhanging possibility of criminal prosecution. He also expressed concern that the DAs may rely on information from a carrier's SIU which in rare cases may be the product of an overzealous investigation. He is concerned that the normal process of the workers' compensation system may be preempted by an overzealous fraud unit of a carrier wanting to interrupt that process by a criminal prosecution. He expressed hope that the two processes work together in an orderly way.

Ms. Sprague stated that district attorneys don't want to chill the activities of the normal operation of the workers' compensation process. She assured Commissioner Steinberg that they do not rely solely on the information provided by the insurance carrier's Special Investigation Unit (SIU). When they receive a report they check it out. They do not rely on SIUs to charge a case but they do rely on them to do a good job which they generally do. She added that frequently, when a case is

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close, they wait to see what testimony is presented in a workers' compensation hearing and how it resolves before bringing charges against a claimant.

When asked by Commissioner Steinberg if she agreed that was the most prudent way to pursue a case, Ms. Sprague replied that they would not wait for the workers' compensation outcome in a case that is so clearly fraud that no one can disagree with it.

Commissioner Steinberg stated that prosecutorial discretion can be used to wait until an appeals board decision before pursuing criminal action. Ms. Sprague replied that prosecutorial discretion doesn't involve waiting for decisions by "historically pro-applicant hearing officers". She referenced several cases in which a case was ruled in the applicants favor even after criminal charges were filed against the applicant and he/she made a plea. Although she doesn't think the criminal process should defer to the workers' compensation process, she did agree with Commissioner Steinberg that, in close cases, the workers' comp process should be allowed to run its course before deciding whether to file criminal charges. Prosecutorial discretion is used when deciding not to file a case because there is no loss. However, if there is a case that potentially involves a loss of over a million dollars, she doesn't believe the criminal process should wait if there is good proof that the person has committed a crime. She said that she doesn't believe they should go into the workers' compensation hearing room and arrest a person. However, if they believe they may have a difficult time finding them or believe they may not show up and know they will be at a certain location such as a workers' comp hearing, they may arrest them after they have appeared.

Commissioner Hlawek stated that there was a three part recommendation before them. First, is to go forward with the findings and recommendations in the Commission Fraud Report that are supported by DOI. Second, those recommendations that are not supported by DOI could be modified to reflect DOI comments. And third, the Commission should convene a roundtable discussion consisting of various represented groups to continue ongoing discussion on items such as what Commissioner Steinberg just brought up. Commissioner Hlawek suggested that the Commission move forward with the recommendation. He said it is well thought out and will get the Commission moving forward in an important area.

Ms. Sprague asked if a copy of the draft report could be made available to the California District Attorney's Association for comment. She stated that there may be other parties, such as insurance companies with active SIUs, interested in responding to the report if it is made available to them.

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Commissioner Hlawek replied that a copy of the report will be forwarded to her. He added that if the Commission goes forward with the roundtable discussion then the comments of all interested parties would be entertained in that forum.

Commissioner Rankin questioned whether the proposed legislation dealing with preventing an injured worker from collecting benefits in case where fraud was committed would preclude a worker, who is legitimately injured on the job and entitled to medical treatment but lies about something else to get PD benefits, from collecting any benefits at all. He stated that there could be situation where the medical treatment is expensive and the amount of money involved in the fraud is minimal. In such a case, it isn't right that the medical treatment then becomes borne by the injured worker because fraud was committed.

Ms. Sprague stated that while at face value it may seem like a good idea, precluding injured workers' from collecting any benefits in a case where fraud is committed is not fair and will not fly. If it went up on appeal, she thinks they would lose. In fact, a Judge in a criminal case has just ruled that way.

Commissioner Vach stated that it wasn't his intention to exclude all benefits. He wanted to clarify the law and make sure that benefit denials will occur when there is a conviction. In a case where two years pass and no fraud is committed, and then fraud is committed, only the ongoing benefits should be examined.

Ms. Sprague agreed that a workers' compensation hearing officer should not be permitted to award a worker with benefits he has just pled guilty to fraudulently receiving. She said that with a little clarification, the Commission can get at what it intends to do and draft a fully enforceable statute.

Commissioner Steinberg stated that he doesn't believe a statutory amendment is necessary because the rules of the process allow a previous criminal conviction to be used as evidence to deny benefits in a workers' compensation case.

Ms. Sprague responded that the problem with the way it currently is that a person can be convicted of fraud in a workers' compensation case for a number of things which may not totally invalidate the claim altogether. It is a problem sort of unique to workers' compensation.

Commissioner Steinberg said that was his point. There are special issues involving workers' compensation and he doesn't think the experiences in other areas of fraud are adaptable. He joined Chairman Hlawek in his suggestion to convene a roundtable discussion to come to some consensus on the issues.

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Commissioner Rankin also agreed stating that he wants to be sure that no action is taken at this time on that recommendation because it is such a complicated issue. Ms. Baker said that that specific recommendation is not included in the fraud recommendations and is a separate issue. Larry Swezey stated that the current recommendation is to leave it to the Board to decide and then review their decision to determine if further legislation is needed.

Mr. Newman then addressed the Commission's concerns about improvements in the operation of the DOI Fraud Investigation Unit. He reported that there have been a lot of changes in the last few months. One of the biggest complaints has been the intake process of suspected fraudulent claims from the insurance industry. That process has been completely changed. Within 12 working days of receipt of a suspected fraudulent claim, a decision is made and the reporting party contacted.

Mr. Newman reported that a new accounting system was put into place July 1, 1997, which allows expenditures to be tracked by program such as workers' compensation or auto as well as by specific regional office. A case management system has also been developed which assigns each suspected fraudulent claim a case number so that it can be tracked as action is taken. When a case is assigned for active investigation, it can be tracked by specific activity as well as investigator time spent with prosecutors, interrogations, travel, and report writing.

As part of the grant application process this year, DOI has required that all district attorneys applying for funding submit a joint plan working with DOI as part of its goal to eliminate overlapping activities.

Mr. Newman reported that DOI is working internally and with the California District Attorney Association to improve internal training in order to be more effective.

There have also been a number of internal management changes. DOI has established clear lines of responsibility and accountability with the chief investigators which went into effect July 1. Additionally, Dick Ross, was hired as Assistant Deputy Commissioner. Previously, he was the agent in charge of the Eastern District of the Federal Bureau of Investigation. He is an attorney by training and has an extensive background with multi-jurisdictional white collar fraud. Mr. Ross will take over all field operations in one place where it is accountable.

Mr. Newman stated that while these improvements were necessary and they will continue to develop an effective program, there are still a lot of good anti-fraud activities within the program.

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Commissioner Vach observed that Mr. Newman's report indicated that there is no automated data base maintained by the fraud division that contains indictment and conviction records. He questioned how they know whether or not they have gotten a conviction without such a database. Mr. Newman replied that there is a reporting process through the district attorneys and the regional field offices just not an automated data base that can be access. He said that with the case management system they hope to have that ability for the foundation of such a database. He said that he would also like to put such a database on the DOI internet website.

Commissioner Vach said that he had provided Mr. Newman with three cases to determine if they were in the system. Mr. Newman said that he had not checked them out yet.

Ms. Sprague stated that a computer data base called the CI&I, to which every law enforcement agency has access, contains conviction and arrest information. When they get a suspect, they normally run their local legal system to see if the person has been in trouble in Alameda county which gives them a CI&I number and sometimes an FBI number for further follow up. However, the system is available only to law enforcement personnel. She suggested that if a claims administrator wanted to check a claimant or doctor, the easiest way is to contact the local District Attorney's office and "tell them you have a suspected crook". They will then run the person on CI&I or call the medical board and see if anything is pending. If there were, Ms. Sprague said they would tell the SIU person that this is worth pursuing and to bring it in. So even though they don't have direct access it is easy enough to get law enforcement attention.

Commissioner Vach observed that there are a couple thousand claims administrators in California each of which will be making the same phone call to the District Attorneys office. Ms. Sprague replied that they encourage calls when they have a case that they are pursuing and want input from the DA's office.

Commissioner Vach said that once a case has been accepted by the DA and has resulted in an indictment there should be some notification to claims administrators that a provider is sufficiently questionable and that they may want to take extra steps to review their claims. Ms. Sprague agreed, and stated in the past, DOI published a listing of all arrests and convictions and sent it out to every insurance carrier in the state. As long as the information is kept on all suspects and sent out uniformly to all interested parties, she believes that it is a good idea.

Chairman Hlawek asked the Commission members if they would like to consider the three part proposal. Commissioner Rankin moved that the proposal be adopted,

Commissioner Vach seconded the motion, and it carried unanimously. Chairman Hlawek instructed Ms. Baker to proceed.

Revisiting Workers' Compensation in California - An Administrative Inventory - Briefing on the study by the Workers' Compensation Research Institute

Carol Telles of the Workers' Compensation Research Institute (WCRI) thanked the Commission for allowing her the opportunity to present findings from the WCRI study of California's workers' compensation system entitled *Revisiting Workers' Compensation in California: An Administrative Inventory*.

Ms. Telles explained that WCRI is an independent, not for profit, research institute group that provides high quality, objective information about public policy issues in workers' compensation. In providing this information to the public, it is their mission to be a catalyst for significant improvement in workers' compensation systems. WCRI doesn't take position on the issues they research and doesn't stated changes that should be made in a system. They believe that role is best left to policy makers.

The WCRI study of the California workers' compensation system looks at the operation of the system from 1992 through 1996. During that time frame, they found that the California system continued to evolve in dramatic ways including significant legislative and administrative changes as well as changes in the insurance structure and economic conditions.

In producing the study, they reviewed the statutes, legislative and administrative changes, court decisions, and studies that were produced by others about the California system, focusing primarily on changes that occurred since the WCRI 1992 study. Once they had a detailed understanding of the system, they interviewed 49 individuals who represented most of the key system participants including labor representatives, employers, insurers, attorneys on both sides, administration officials, and staff at the division and the workers' compensation appeals board, staff and members of CHSWC, special interest groups and legislative staff.

WCRI used data from WCIRB, DWC, WCAB, and CWCI and analyzed the data from the most recent years available and in most cases this was 1984 - 1995. The draft report was sent to all whom had been interviewed as well as two nationally recognized workers' compensation experts to review the factual accuracy of their description and the logical consistency of the observations and conclusions.

Ms. Telles focused on four of the major study findings.

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First, the workers' compensation system costs have dropped substantially in recent years. At the same time, maximum benefits for workers were increased significantly. Did this produce a win-win situation for both business and labor providing more balance to a system that has been widely characterized as a high cost/low benefit system?

Second, claims classified as PPD and lump sum occur more frequently and count for a bigger share of cost in California than they do in most other states. They examined the factors that contribute to these outcomes and looked at lessons from other states.

Next, system administration presents considerable challenges, some of which may be unique to California. These challenges were identified and they again looked at lessons from other states.

Finally, the lack of consistent, comprehensive data to assess system performance on key measures seriously impedes the ability of policy makers to form rational views on what works and what doesn't.

Workers' Compensation Costs Versus Benefit Increases

Ms. Telles stated that the California Department of Industrial Relations estimates that workers' compensation costs dropped \$3.5 billion in two years -- from \$11.5 billion in 1993 to about \$8 billion in 1995. There is debate about the size of the cost reduction and whether or not the downward trend continues, but few parties disagree that a dramatic shift in system cost has occurred.

And, Ms. Telles continued, if one believes that costs in the California system were excessive, then the state has achieved a remarkable success. Under the 1993 reforms, cost containment provisions were expected to save \$1.5 billion. Included were provisions that focused on reducing litigation and fraud in the system, reducing the number and cost of med/legal exams, limiting stress and post-termination claims, and capping vocational rehabilitation cost. In anticipation of these cost savings, benefit increase for injured workers were approved up front to be implemented over a 3-year period, from 1994-1996. The cost of these increases was estimated to be about \$75 million or half of those expected cost savings. Well, the benefit increases were significant. The maximum PTD rose 45% from 1994-1996. The maximum weekly PPD was also increased for more severely disabled workers with disability ratings of 15% or higher. So costs dropped more than expected and benefits were increased. The debate continues on the proper balance between system cost and benefit level.

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Ms. Telles reported that most parties agreed that the benefit increases implemented from 1994-1996 were warranted. These increases helped bring California workers closer to what might be termed national norm. Still in 1996, 35 states had a higher TTD maximum and 28 states paid PPD at the same rate as TTD. So while California has certainly made progress in improving benefits for workers, there is arguably room for further improvement. The question that is being debated is whether benefits should be increased further based on estimated system cost savings that were in fact double the savings that were expected under the 1993 reforms.

Ms. Telles said that the crux of the question seems to be what part of that cost savings is in fact attributable to the 1993 reforms. Unfortunately, the WCRI study could not answer that question. But data shows that costs were falling prior to the 1993 reforms. Key to the drop in costs, is the drop of claims that was observed. Some of this can be attributed to the 1989 reforms. But there has been a similar drop in claims in states even when there has been no major legislative reform. Likely contributing factors to this drop is workers' compensation costs started to soar nationwide which produced more employer-insurer attention to safety and some changes in claim handling practices. In California, the serious recession also had a significant effect. Ms. Telles suggested some caution in attributing cost reduction to the reforms without further evidence or analogies. She said that clearly the reforms had an important impact, but it is very difficult to disentangle this from other forces.

Commissioner Rankin asked why the elimination of the minimum rate law was left out in a WCRI chart as part of the 1993 reform. He stated that it was one of the more significant things done in 1993. Ms. Telles agreed that it was significant but that as a matter of policy, the WCRI doesn't deal with insurance rate questions and issues. It is certainly an underlying factor, but not something they typically look at when doing a descriptive study such as the California study.

Commissioner Rankin said that on page 118 of the WCRI report they concluded that costs in California have decreased but it is difficult to disentangle the contribution of the reforms from the effects of market forces and other factors. He said that what disturbs him is that while they talk in detail about the costs dropping, they say nothing about the benefits. He said that it presents a one-sided picture and calls in to question their particular bias in doing this kind of study. In response to Ms. Telles request for clarification about the benefit increase, Commissioner Rankin stated that the amount of benefits that workers received was less than \$750 million.

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Ms. Telles said that she was not aware of any data that would support that observation. Commissioner Rankin stated that she should check with the Workers' Compensation Insurance Rating Bureau. Ms. Telles assured him that she would.

Commissioner Vach said that because the benefit increases were stepped and data is only available through 1995, it may be no way to know today what exactly the benefit became on a per case basis cumulatively. They may be able to tell us next year what happened in 1995-96 since benefit dollars can't be drawn until there is at least 18 months experience into a particular year. He suggested that the WCIRB make that analysis as part of their follow-up. Ms. Telles agreed saying that in states where data is collected on a paid benefit basis they can obtain much more recent information on cost trends. However, that information is not available in California.

Mr. Rankin replied that some information does exist because the Commission has done a couple of studies on the cost savings in Vocational Rehabilitation. He said that they are specifically measured but were left out of the WCIRB report. Ms. Telles said that those studies are in fact cited in the report as indications of cost-savings in those particular areas. However, it is difficult to take all of those things together on a comparative basis as to what the system looked like before and come up with which cost savers were attributable to which changes. She said that in their type of study, it can't be done.

PPD and Lump Sum Claims

The frequency and cost associated with Permanent Partial Disability (PPD) and lump sum claims in California has been considered to be a system issue for a long time and remains very high. PPD and lump sums claims represent the lion's share of indemnity costs in most workers' compensation systems. But California's share of the cost of PPD and lump sum claims is greater when compared with other states recently studied.

Ms. Telles reported that WCRI research on reducing litigation and their administrative inventory studies in other states have identified some workers' compensation system features and processes that together can work to limit litigation and speed resolution concerning PPD benefits. These processes may also have a role in reducing cost or at least redistributing more of the benefits to workers.

- First, written guidelines or disability evaluation standards can help to create some certainty for workers, employers, and insurers about what payments are due.

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- Next, an active workers' compensation agency that requires an evaluation by treating physicians, assigns a value to the evaluation according to written standards and notifies the parties of what should be paid and when. This helps to create a process that parties understand and follow.
- Third, the incentive to use treating and non partisan physicians based on the belief that these physicians are most familiar with the workers injury and circumstances. This avoids the presumption of bias that often occurs with partisan physicians and the need for the other side to obtain a rebuttal evaluation.
- Fourth, incentives to avoid the practice of splitting the difference between partisan ratings. Having a partisan rating doesn't change the outcome as when a judge is required, in a litigated case, to pick one rating or the other.
- Finally, the use of state employees independent evaluators to translate medical reports into disability ratings which helps to provide some consistency.

Ms. Telles said in looking at this list, California has many of these processes in place. So why is PPD considered a problem?

It appears that there has been some breakdown in these PPD processes in California. Proposed PPD payments are not viewed as consistent and predictable. This results in litigation and, in most cases, negotiated lump sum settlements.

Interviews with system participants suggest the following contributing factors.

- First, WCRI was told that there is considerable variation in the quality of medical reports. The Industrial Medical Council (IMC) is responsible for setting standards for the reports and for educating QME's on the elements of an effective report. Yet few people interviewed were aware that these standards exist. This is being studied in California and may be an area where more education and training is needed especially for treating physicians who are providing these ratings.
- Second, WCRI was told that the Disability Evaluation Unit (DEU) staff do not necessarily reject inadequate physician reports. Instead they use the

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information to produce a rating so as to not create further delay. These ratings may be contested and lead to litigation with its cost and delay.

- Third, the reforms call for revision of the Permanent Disability Rating Schedule (PDRS) to provide more clarity. The revised schedule became effective in April 1997 so it is a little early to tell whether greater consistency will result. Training will be one key to its effectiveness. System participants indicate that the schedule has not been applied consistently by DEU staff within and across district offices. As a result, the rating process is viewed as subjective even though the structure should produce objective outcomes. Certainly, further research is needed to determine to what extent this variation does, in fact, occur.
- Finally, insurers in particular cited add-on factors as a big problem in creating variability. Ms. Telles explained that add-ons are factors related to age and occupation. They are a problem in terms of the variation that occurs when those factors are considered in the determination of the ultimate rating.

Commissioner Vach clarified Ms. Telles' remarks by stating that a rater assigns a standard rating using the formula then throws in anywhere from 0.5% to 15% for subjective add-ons. The fact that an add on can vary so much is why it is a problem.

Ms. Telles continued stating that California's policy makers have recognized that this is an area needing attention. It would appear that there are at least two options. The first would be to refine or revise the current structure so that the outcomes are more consistent and predictable for system participants. Or second, start over and rethink the philosophical approach to PPD in California using impairment or disability or some combination thereof, constructing a new system which supports that response.

Administrative Challenges

Ms. Telles said that system participants' need for greater consistency can be extended beyond the specific issue of PPD benefits to the system as a whole. In reducing system complexity and improving consistency, the DWC is faced with unique administrative challenges. There are two sets of factors that seem to contribute to this.

There are inherent structural differences between California and other states that would suggest, all things being equal, that problems surrounding complexity and

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inconsistency would be likely to arise. And these certainly include the massive claim volume in the system, the geographic size of the state that brings about the need to manage both real and perceived regional or North/South differences, and being the largest state system, the presence of powerful, political interests that can make the passage of legislation and its implementation much more difficult than it might be in some other states. Against this background there are some aspects of the design and administration of the California system that reinforce complexity and perceptions of inconsistency and which policymakers might have more success in improving.

First, the division administers several resource intensive and complicated processes that are not typically part of the responsibility of a state workers' compensation agency. These include disability evaluation and determining vocational rehabilitation eligibility. Frustrations or problems that system participants have in dealing with these particular programs are directed against the agency with in other states they may be diffused across the system as a whole. Certainly a major part of the challenge for agency administrators in allocating resources which are always limited, is allocating those resources in a way to maximize the systems outcome that it seeks to achieve.

Second, system participants express concerns about complexity and inconsistency in the dispute resolution system. Currently, there are three workers' compensation systems operating simultaneously as a result of the parallel processes for adjudication based on the date of injury and whether or not the worker has retained an attorney. This complexity adds to the administrative cost and requires an understanding of the rules under multiple systems. Workers in particular may perceive a real need for help and therefore turn to attorneys for information and assistance under the situation. Assuming that no new legislation is passed, this situation would go away over time. However, at this time, it is clearly an area that leads to confusion.

Ms. Telles noted that although DWC provides information through its information and assistance offices upon request, some participants perceive that the information is not always up to date or isn't consistent across offices. Though the division has recognized the importance of information, it is unable to proactively and broadly inform workers of their rights and responsibilities because it doesn't receive injury reports or claim forms. So unlike in other states, there is no intake mechanism that might generate the automatic mailing of information to workers as often occurs in other state workers' compensation agencies.

System participants WCRI interviewed perceived differences in practices and procedures across district offices. The statute requires uniform court procedures,

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forms, etc., however system participants noted that some judges require non-standard forms on non-standard preparation of filing. Clearly lien claims and continuances are also handled differently. The Division has implemented a number of mechanisms to improve consistency such as the Regional Manager structure and some other things. However, changes have not been in place long enough for system participants to have observed tangible improvements.

Lack of Data Collection

During the study, WCRI found that DWC collects very little data on aspects of either agency or system performance. While the Division does a comparable job of tracking dispute resolution activities, there are a number of important data items that the Division does not capture. Without this kind of information, it is difficult to understand how well the system is working in very important areas such as benefit delivery as well as overall cost.

A lack of data hampers policymakers ability to evaluate the impact of reform or to target further efforts at improvement and forces them to rely almost exclusively on external analysis and studies. Different study design, objective, data sources, and methodology can sometimes produce contradictory findings that in order to be useful requires some kind of reconciliation. Without a basis for achieving that reconciliation, policy decisions become embroiled in debate, and policy makers rely on those sources that they believe to be the most credible, sometimes not considering those alternative views. In a system as large and complex as California, the ability to understand and calibrate the true magnitude of problems is critical to focusing administrative and legislative attention appropriately.

Future Challenges

Ms. Telles said that the findings of the WCRI study point to a number of areas that will continue to challenge California into the next century. These include striking an acceptable balance between cost and benefits, resolving issues surround PPD and lump sum benefits including cost frequency and predictability, improving the overall consistency and predictability within the system, and building capabilities to provide objective, reliable information. For any state addressing even one of these issues, is likely to be a very difficult and demanding task. However, even as the long term impacts of the 1993 reforms continue to surface, we find that there are some mechanisms in place to suggest that California may be taking steps toward future improvements in these areas at this time.

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For example, the cost-benefit debate is likely to remain a significant focal point of the system. There is little agreement between business and labor about the extent of cost-savings due to the 1993 reform and whether workers are entitled to additional benefit increases. Some of the questions surrounding this issue may be clarified as more recent data becomes available in the post reform period.

Second, the successful implementation of the revised PPD schedule has a potential to reduce some of the issues with respect to high PPD cost and frequency. Ms. Telles noted that California has certainly recognized the importance of this problem in commissioning the RAND study through the CHSWC. It is anticipated that this study will provide a foundation for considering possible changes to the PPD benefit structure. The Division has also taken a number of steps toward improving overall system consistency and predictability. These efforts include the regional manager structure, quarterly training for referees, the simplification project, and emphasizing the education within the audit program. Time will tell if these will result in tangible improvements.

Finally, the Division's plan to design and implement a data system coupled with the on going research activities of the CHSWC suggest that California is evolving toward building capabilities to provide objective reliable information that can assist policymakers in making those reform decisions about to be seen and certainly will be of considerable interest in the years to come.

Discussion

Commissioner Rankin asked about a brief segment in the WCRI report expressed the viewpoint that the audit function is a burden on insurers and doesn't really produce results. Ms. Telles said that was not a fair conclusion to draw. She replied that employers and insurers did note the burden involved. However, the study also noted the amount of cost savings or costs that were payable to workers as a result of those audits which suggests that audits are clearly necessary in the system.

Commissioner Rankin said that the WCRI report did not note that in one of eight files audited, workers are due money that wasn't paid to them. He said that if insurers weren't collecting the right amount of money from one of eight employers that pandemonium would ensue. However, when it comes to the question of injured workers not getting what is due them, it is passed over as not a big deal. But it is tremendously important and indicates that the audit program should be expanded and made more efficient. Maybe that would stop it.

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Ms. Telles stated that part of what the WCRI study suggested was the audit program could be improved by beefing up the educational component -- providing feedback to employers and insurers as to what is being done incorrectly and giving them the opportunity to improve their performance.

Commissioner Rankin asked if WCRI looked at whether or not insurance companies were cutting back on claims adjusters and other staff to save costs due to the changes in the minimum rate law. Ms. Telles replied that there is no information to support that theory, but it would not be an unreasonable conclusion. Across the country from the early 1990's, WCRI has been told that claims staff has been reduced for various business reasons including regionalization of insurance operations. But there are no numbers to support that.

Commissioner Vach said that the issue of audit findings is interesting because to determine what is payable and what is not payable in a particular claim depends on the benefit structure and the determination issues that are involved in it. So if there is a high error rate, the complexity of the benefit structure is presumably involved in some way. In other words, the more difficult it is to determine what is due, the greater the possibility of error. Ms. Telles agreed that it was not a straightforward issue.

After some discussion on what period was used to measure the cost impact of the 1993 reform, specifically the measurement of cost savings of the reform against benefit increases, it was determined that two years of data was used. The projected cost estimate was produced at one point in time during the negotiating process that lead to the 1993 reforms. Also used was evidence about the cost savings that had been achieved from 1993-1995.

Commissioner Steinberg asked Ms. Telles where she got the figure that the workers' compensation costs dropped \$3.5 billion in two years. Ms. Telles replied that the estimate came from the Department of Industrial Relations.

Commissioner Steinberg asked for clarification about the fact that the effect of open rating was not factored in and the \$3.5 billion estimate was based on the figure of what was actually estimated to be paid during the studied period. He asked if that meant that to the extent that the carrier decided during open rating to operate at or below cost, that the actual savings to employers would be greater than the \$3.5 billion estimated by DIR. Ms. Telles replied that she didn't believe the DIR estimate is looking only at the impact of the reforms but about costs in general.

Report on the CHSWC Medical/Legal Study

Frank Neuhauser from the University of California at Berkeley presented a summary of the findings from the second year of evaluating the Workers' Compensation Insurance Rating Bureau's Permanent Disability Survey regarding medical-legal costs.

The WCIRB conducted a survey covering active years 1989- 1995 to determine the result of the reforms. The data Mr. Neuhauser presented is for the insured community only -- self-insured companies do not submit data to the WCIRB.

Mr. Neuhauser said that last year's report on the impact of the reforms of the med/legal process indicated some dramatic changes and declines in the cost and frequency of exams. These more recent data also suggest that the substantial savings, especially for the 1993 and 1994 accident years, continue into the 1995 accident year. The 1996 report found that substantial savings resulted from changes in the Medical-Legal Fee Schedule and the decline in psychiatric exams and claims. These trends continue to be demonstrated in the 1997 report's findings.

The costs of medical-legal exams have declined about 85% from a high of \$394 million in the 1991 accident year to an estimated \$59 million for the 1995 accident year. This significant reduction in costs is attributable to declines in the number of permanent disability claims, the number of exams per claim, and in the average cost per exam.

In addition, data for the 1994 and 1995 accident years suggests an additional source of major cost savings, the emphasis on the role of the treating physician in the medical-legal process. This legislative change is likely responsible for a substantial portion of the decline in the average cost and frequency of medical-legal reports on claims occurring after January 1, 1994.

Mr. Neuhauser went on to say that, unfortunately, these data are not going to be available in the future. This accident-year data was developed by the WCIRB in response to the request of the Legislature and the Department of Insurance for the 1989 reforms, which have been superseded by the 1993 reforms. The WCIRB has discontinued accident-year data and gone back to creating only policy-year data.

Mr. Neuhauser stated that these WCIRB accident-year data are valuable for evaluating legislative changes which are keyed to calendar rather than policy year. He guessed that the accident-year data is not expensive to develop. He expressed his thought that a letter from the Commission requesting that WCIRB continue the data set would get a positive response.

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Mr. Neuhauser said that the permanent disability survey the WCIRB has is very good and is a valuable tool, but it needs to be updated. The project team made some recommendations last year about changing the survey and he said that it might be useful for the Commission to continue such discussion with the WCIRB. He noted that the needed changes were especially apparent with this year's analysis because the treating physician role is becoming prominent. There is currently no way of determining which of the reports is done by a treating physician or a panel QME, or how they will be defined, or whether they are at the applicant or defense request. Nor is there a geographic variable that would allow an analysis based on Northern vis-à-vis Southern California.

[Special Note: On August 13, 1997, CHSWC sent a letter to the WCIRB requesting that WCIRB continue its permanent disability survey and enclosing suggestions for small changes which would further enhance the value of the data collected.]

Commissioner Rankin moved that the Medical-Legal report be approved and made available on the internet. The motion was seconded by Commissioner Steinberg and passed unanimously.

Update and Discussion Regarding Commission Studies and Projects

Vocational Rehabilitation

Ms. Baker asked if the Commission would like to make the revised vocational rehabilitation study report available to the public and post it on the internet. After some discussion, it was agreed that input from the community and commission members should be forwarded to Commission staff within three weeks for incorporation into the report. After three weeks, the report will be finalized and made public so that the findings and recommendations can be included in the Commission's annual report.

Liens

Ms. Baker reported that several round table discussions regarding the lien issue have taken place over the last two months. Pursuant to findings from the District Offices as well as from the round table meetings, recommendations were drafted regarding assignment of stale liens, EDD liens, liens being left unresolved in referee

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decisions and orders approving compromise and release, lack of preparation and failure to serve medical reports, defective service and proof of service on lien claimants, billing disputes, and referees' complaint of lack of time to resolve lien claims. Legislative language was also drafted to place time limits on the filing of liens to collect medical bills, to require prompt disposition of lien claims, and to require that lien information be provided at mandatory settlement conferences.

The roundtable activities have been very productive. EDD came up with some ideas on how to negotiate liens outside of the workers' compensation system and negotiate directly with the insurance carriers or providers. There have been many other positive activities because for the first time, they have been brought together to talk about some of the problems and resolve them themselves without the need for legislation.

Ms. Baker said that she received a letter from Kaiser urging the enforcement of existing rules requiring the resolution of lien claims at the same time that the applicant's case is resolved. They questioned whether new legislation is necessary and stated that enforcement of existing rules should produce the desired result.

Ms. Baker said that Commission staff drafted legislative as well as administrative recommendations. She reported that there are two versions of recommendations. One that Commission staff initially proposed and a less restrictive version that was discussed in the round table meetings. It was the second version that was agreeable to the round table participants. She also noted that, although DWC did not formally approve the version which they cannot do without going through an internal DIR legislative review process, they did not object to it.

Commissioner Vach responded that the Commission cannot hold their recommendations just because the DWC can't respond as quickly as other parties. He said that DWC always has the opportunity to object as does the Legislature and doesn't see a reason why a recommendation should be postponed.

Commissioner Steinberg replied that he understands that the round table is still undecided on the lien issue and what legislative changes are necessary, if any. He said that the lien issue is very complex and he is reluctant to endorse any specific recommendation unless there is some consensus among the group as to what needs to be done.

Commissioner Rankin observed that it is unlikely that anything can be accomplished legislatively because it is so late in the legislative year. Therefore, since there is still disagreement on the issue, it makes sense to defer the issue until the next legislative year and give the parties time to reach an agreement.

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Larry Swezey said that there was agreement that there should be time limitations. The disagreement was about how much time.

Commissioner Vach said that he understands the legislative problem. However, the lien backlog has not been addressed effectively and he questioned whether the time limit question will still be a giant barrier to the resolution of the issue if the Commission waits until next year

Ms. Baker suggesting putting the recommendations in the annual report with a statement that the issue will be explored further. The annual report would state where the Commission is to date on the issue and that it is still awaiting further input from the community.

Commissioner Vach replied that he is reluctant to do that because it is an issue that is not going to go away. He said that the Commission should at least come out and say that there needs to be time limits. But he will go along with Ms. Baker's recommendation.

David Robinson and Nancy Roberts, both lawyers representing health insurers, pre-paid health plans, Kaiser and other similar entities, addressed the Commission with their concerns on the time limit issue. Their concern is that the entities that they represent are not always notified that a claim is industrial. If the time limitations are enacted, it would affect their remedy. For example, there may be an industrial injury, a findings and award and continued medical treatment but five years after the date of injury and more than a year after the findings and award, the employer disputes the necessity of further treatment. The injured worker then resorts to a medical plan he may have through a spouse or his employment, and the carrier doesn't get the bill for over a year after the treatment is provided because they are not the direct provider. They have no remedy under these time limitations. They emphasized that there needs to be some exception for these type of plans so that they have a reasonable remedy. Otherwise, they foresee the plans going to the applicant for reimbursement.

Commissioner Steinberg asked why the entities they represent do not know when a claim is industrial. If a claim is work related, doesn't it give notice to the fact that they should be inquiring about a pending workers' compensation claim? Mr. Robinson replied that most of the claims are cumulative traumas rather than specifics. At the time the patient is seen a history may not be taken or the physician has no incentive to advise on the claim form. They cannot ask questions and just pay the claim.

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Commissioner Steinberg asked where they suggested the Commission draw a line and fairly apply a statute of limitation on stale claims. Mr. Robinson said that he would like more time to respond since he just received notice. But a quick fix would be a provision for a delay of the implementation of the jurisdictional time limitation if there is notification that these types of benefit providers have been provided. It would allow a period of time in which a notified provider can act upon a right. Then if they do not act upon a right timely, then a statute is fine.

Ms. Roberts added that the flip side of a stale lien claim is a stale liability. She suggested that the insurance carriers should possibly have the burden if they have knowledge of another payer of treatment to find out what the source of the payments are -- similar to a Reynolds notice² in workers' compensation. Then if there is a lack of notice the statute of limitations is tolled.

Commissioner Vach said that often the employer or carrier also isn't aware of a claim. Treatment is going on but no one has the claim. Mr. Roberts replied that if the employer or carrier has no notice of it, then there wouldn't be a tolling of statutes. Commissioner Vach responded that would create a system in which the carrier is required to tell people that they may have at one time or another treated somebody for something and it can get very complex.

Mr. Roberts stated that in most cases significant treatment occurs in his client's situation just prior to the filing of a claim. But at the time that the treatment is rendered, the claim form does not get filed. He said it is overwhelming the number of times that all parties except his clients are aware of the existence of his client's right to involvement. He said that they do not dispute the time limitation as long as their clients have a fair shake to pursue a remedy.

Lloyd Rowe of CAAA commented that this doesn't seem to be an urgency measure and may be better served to put off for this legislative year. He said that it is his understanding that the lien problem is resolving slowly through the efforts of the DWC. There are also continuing large issues that need to be addressed. He said that the Commission proposal on this issue is not CAAA's proposed language and they may have a problem with signing off on it. They were there and did participate but those are not their drafts and were not agreed to.

Commissioner Rankin suggested that this issue be put over to the next meeting. Commissioner Vach agreed.

² See *Reynolds v. WCAB*, 12 C3d 726, 39 CCC 768 (1974), §18.7.3, *infra*.)

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Permanent Disability Summit

Ms. Baker reported that Commission staff is planning for the Permanent Disability Summit on November 21 and a draft pamphlet was prepared.

Commissioner Steinberg suggested a language revision in the pamphlet relating to the status of RAND's study. RAND is still collecting data and the study will be ongoing from the summit. However, the language in the brochure suggests some degree of finality which can't be expected by November 21st. He suggested the language be changed to reflect that. Commissioner Vach agreed. Ms. Baker stated that she would incorporate Commissioner Steinberg's comments into the draft and then distribute it to the Commission for review before publication and distribution.

Carve-Out Project

Ms. Baker reported that the second Carve Out Advisory Committee meeting is scheduled for Monday, October 6, 1997 in Berkeley.

PDRS Memorandum of Understanding

Ms. Baker reported that Commission staff and DWC AD Casey L. Young have been exchanging drafts of the proposed Memorandum of Understanding (MOU) to clarify the division's and Commission's role in relationship to the Permanent Disability Rating Schedule as well as any proposed new changes.

Larry Swezey and Ms. Baker met with Mr. Young who indicated that he would like to formalize some process by which the Commission can make recommendations to him and he adopt those changes and outline how that process will happen.

Commissioner Vach said that he is relatively happy with the draft that he has seen although there are a couple of unanswered questions. He said that Chairman Hlawek will have to give the final approval with the agreement of the Commission at the next meeting.

Other Studies/Projects

Ms. Baker reported that all other projects are progressing smoothly with no major status changes or difficulties. There have been some delays in collecting

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information from the DIR Division of Labor Statistics and Research for the SDI study.

Ms. Baker requested that the October 1997 Commission meeting possibly be canceled in order to give staff enough time to work on the permanent disability summit. That determination will be made at the next meeting.

Other Business/ Public Questions/Comments

There were no additional public comments.

Future Meetings

The next meeting of the Commission will be held on Thursday, September 18, 1997, at 10 a.m. in the First Floor Hearing Room at the Department of Consumer Affairs at 400 "R" Street in Sacramento..

Adjournment

A motion to adjourn the meeting was made by Commissioner Rankin , seconded by Commissioner Schwenkmeyer, and passed unanimously.

The meeting was adjourned at 1:10 p.m. by Commissioner Vach (acting for Chairman Hlawek, who had to leave the meeting early).

Approved:

Respectfully submitted,

E.B.
James J. Hlawek 9/1/97 Christine Baker
James J. Hlawek, Chairman Date Christine Baker, Executive Officer